JD(SF)–60–03
Chandler, Arizona

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

PIMALCO, INC.

and Case 28-CA-18462

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC

On Behalf of the General Counsel
Jerome E. Schmidt, Esq.
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On Behalf of the Charging Party
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On Behalf of Respondent
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DECISION

Statement of the Case

John J. McCarrick, Administrative Law Judge. This case was tried in Phoenix, Arizona on June 16, 17 and 18, 2003, upon General Counsel's Complaint that alleged Pimalco, Inc., (Respondent) violated Section 8(a)(1) and (5) of the Act by dealing directly with employees and by eliminating the unit position of safety coordinator without notice to The United Steel Workers of America, AFL-CIO, CLC (Union) and without affording the Union an opportunity to bargain with respect to the effects of this Decision.[1] Respondent timely denied any wrongdoing. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following:

[1] At the hearing, Counsel for the General Counsel filed a Notice of Intent to Amend Complaint. The Notice sought to amend the Complaint to allege 17 employees of Respondent as supervisors and agents within the meaning of the Act in paragraph 4(b). I granted the Motion. *Payless Drug Stores*, 313 NLRB 1220, 1220-1221 (1994); *Pincus Elevator & Electric Co.,* 308 NLRB 684, 684-685 (1992); *Sheet Metal Workers Local 91 (Schebler Co.),* 294 NLRB 766, 774-775 (1989). Respondent admitted that all employees but Harl Chamberlain and John Emory are supervisors and agents within the meaning of the Act. Later in the hearing Counsel for the General Counsel withdrew paragraphs 6(d), (e) and (g) of the Amended Complaint.

Findings of Fact

I. Jurisdiction

Respondent, a Delaware corporation with an office and place of business in Chandler, Arizona (Respondent's facility), has been engaged in the manufacture and extrusion of aerospace aluminum products. During the 12-month period ending January 23, 2003, Respondent in conducting its business operations purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Arizona. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Issues

1. Did Respondent violate Section 8(a)(1) and (5) of the Act in August 2002 by dealing directly with employees concerning Jesus Arredondo's grievance?

2. Did Respondent violate Section 8(a)(1) and (5) of the Act in November 2002 by dealing directly with employees to remedy grievances concerning the Thanksgiving holiday schedule?

3. Did Respondent violate Section 8(a)(1) and (5) of the Act in November 2002 by eliminating the Safety Coordinator position?

4. Did Respondent violate Section 8(a)(1) and (5) of the Act in January 2003 by dealing directly with employees concerning the work schedule?

5. Did the Union waive its right to bargain over schedule changes and removal of the Safety Coordinator position?

III. Alleged Unfair Labor Practices

A. The Facts

1. Introduction

Respondent produces aerospace aluminum products at its facility in Chandler, Arizona. Respondent's facility consists of four buildings: IBC, Aerospace, PSI and Drawn Tube Mill. In 2002[2] William Pottgen (Pottgen) was Respondent's Director of Human Resources, Arvid H. "Butch" Sorenson (Sorenson) was Flow Path Manager in the Aerospace plant, Gary Dale (Dale) was the plant superintendent in the Drawn Tube Mill, Roger Dvorak (Dvorak) was the supervisor of the Aerospace press department and reported to Sorenson, Clarence "Zeke" Sutton (Sutton) was group leader in the Aerospace finishing department and reported to Sorenson, and Crickett Lee (Lee) was a supervisor in the Drawn Tube Mill and reported to Dale.

From 1997 to 1998, Manuel Armenta (Armenta) was the Union's staff representative for Sub-District II and from 1999 to the present was Sub-district Director for Sub-district II. From

[2] All dates herein refer to 2002 unless otherwise noted.

1999 to the present John Fisher (Fisher) was the Unit Chair[3] for Union Local 3937 at Respondent's facility. In November 2002, Harry Lutes (Lutes) was Union steward in the Aerospace department. In August 2002 Rudy Marrufo was the Union's griever in the Drawn Tube Mill.

Respondent and the Union have been parties to a collective-bargaining agreement since April 1, 1998 effective through July 31, 2003. The Union is the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit:

> All hourly production employees employed by the Respondent, but excluding all clerical employees, professional employees, die repair and maintenance employees and supervisors as defined in the Act.

2. The Jesus Arredondo Grievance

On about August 7, Jesus Arredondo (Arredondo), a general helper in Respondent's Drawn Tube Mill, asked his supervisor Lee if he could leave work two hours early on August 8 if he worked two hours late on August 7.[4] Lee said that was ok. However, later on August 7 Lee changed his mind and told Arredondo he had not given sufficient notice. Lee told Arredondo if he took the time off for the doctor's appointment he would get a warning. Arredondo then had a conversation with Mary Ramsey (Ramsey), a team leader for Respondent in the finishing department and a former Union Unit Chair and Griever. Ramsey told Arredondo, "don't worry. I talked to Bill Pottgen, and everything's fine." Arredondo replied, "Thank you. I don't need you, but I talked to Rudy (Marrufo) already." Ramsey said, "not to talk to him, talk to me."[5] Later on August 7, Arredondo complained to Union Griever Marrufo about the denial of leave for the doctor's appointment. On August 7, Marrufo spoke with Lee who told Marrufo that Dale said Arredondo could not take the time off. Marrufo next spoke with Dale who advised Marrufo he was just following policy. Marrufo said he would have to file a grievance. At about 1:30 p.m. on August 7, Marrufo had a conversation with Ramsey. Ramsey told Marrufo that she could fix Arredondo's problem. She said she had talked to Pottgen and all Marrufo had to do was talk to Pottgen and he would fix it. Marrufo replied that he was filing a grievance over the matter.

Ramsey said that on August 12, fellow employee Cathy Strong told her that Dale changed the policy for taking time off for doctor's appointments and that Arredondo was getting written up for going to a doctor's appointment. Ramsey then approached supervisor Lee who told her that, " . . .yes, that it had come down that Gary Dale was no longer going to allow us to fill in our hours or make up our time." Ramsey admitted talking to Pottgen next about the issue of time off for doctor's appointments. Ramsey asked Pottgen when the policy changed about making our schedules up. Ramsey mentioned that Arredondo was going to be written up for an attendance problem because of a doctor's appointment. Pottgen replied he had no idea about this. Ramsey said she had a doctor's appointment and what was she to do. Pottgen said, "go talk to Gary (Dale), and then if I had any more problem with it, to come back to him." Ramsey next spoke with Marrufo and said she had spoken with Pottgen. Ramsey suggested that Marufo go to the first step of the grievance procedure regarding Arredondo and speak with Pottgen.

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[3] The Unit Chair was the chief officer for Union Local 3937 at Respondent's facility.

[4] Arredondo testified he had this conversation with Lee on August 6, 2002. It is clear from the Union's grievance and Arredondo's time records that the conversation occurred on August 7, 2002. General Counsel's Exhibit 7 and Respondent's Exhibit 7.

[5] While Ramsey admitted having a conversation with Arredondo, she denied telling him not to talk to Marrufo.

Marrufo said, "I don't need to talk to Bill Pottgen, I'll go by the grievant's (sic)". On August 12, after 1:30 p.m., Ramsey spoke to Arredondo and asked if he had worked out his problem. Arredondo said Marrufo had worked it out for him. Ramsey said she had just been in Pottgen's office and they were still allowed to use forms to schedule time off for doctor's appointments. Ramsey said she had just spoken to Marrufo and he did not mention working out the problem.[6]

On August 8, Arredondo told Marrufo that Ramsey had approached him and said she had taken care of the warning. Ramsey told Arredondo that Marrufo did not know how to do his job and to talk to her not Marrufo. Marrufo told Arredondo he was filing the grievance today. On August 8 Marrufo filed the grievance concerning Arredondo's leave with Dale. The grievance form reflects that Dale agreed to remove the warning from Arredondo's file on August 9.[7] Arredondo's time records reflect that he worked two hours late on August 7 and left two hours early on August 8. He did not work on August 9, 10 or 11. For the reasons set forth in the Analysis section, it is unnecessary to resolve the credibility conflict in the testimony of Arredondo, Marrufo and Ramsey.

3. The Thanksgiving Holiday Grievance

In mid November, employees in the Aerospace finishing department who worked the 4:00 p.m. to 2:30 a.m. shift were unhappy with the Thanksgiving schedule because it required them to work to 2:30 a.m. on Thanksgiving Day. According to Lutes, a metal finisher/team leader and Union steward in the finishing department on the 4:00 p.m. to 2:30 a.m. shift, on November 18 from 4:00 p.m. to 4:20 p.m., supervisor "Zeke" Sutton conducted a meeting with 25 employees present. Various employees complained about the Thanksgiving schedule. According to Lutes, Sutton told employees that Flow Path Manager Sorenson was not an evil person and would listen to them. Sutton suggested that the employees elect someone to go talk to Sorenson. The employees selected Lutes to speak with Sorenson about the Thanksgiving schedule. Lutes testified that on November 19 at another meeting with the finishing department employees, Sutton said that employee Marcus Sekayouma had spoken with Pottgen and that the Thanksgiving schedule was going to be changed. Sutton testified that he was on vacation the week before November 18. When he came to work on Monday, November 18 at about 3:30 Sorenson met Sutton and took him to the Drawn Tube Mill to interview for a job there. Harl Chamberlain took Sutton's place as supervisor in the Aerospace finishing department. Sutton interviewed with Sorenson, Tom Ploughe, Dale and Keith Bimbo for two hours. Sutton was given the job and he left work at 6:15 p.m. to sleep so he could begin work the next day on the day shift. Sutton's testimony is corroborated by his own time sheets[8] and by Sorenson's testimony. No other employees were called to corroborate Lutes' testimony. Sutton denied that he encouraged employees to deal with Sorenson or that he said Sekayouma had resolved the Thanksgiving schedule with Pottgen. I credit the testimony of both Sutton and Sorenson.

[6] While Ramsey contends that these conversations occurred on August 12, the probabilities suggest it occurred on August 7. Ramsey says Arredondo was not yet written up and that Lee was still of the opinion that Dale would not allow employees to make up time for doctor's appointments. Ramsey claims that Marrufo had not yet filed the grievance. By August 9 the matter had been resolved by Dale, Ramsey's conversations had to occur no later than August 8.

[7] General Counsel's Exhibit 7.

[8] Respondent's Exhibit 3.

4. The Elimination of the Safety Coordinator Position

In addition to his duties as duties as Union Unit Chair, Fisher was Respondent's Safety Coordinator for two years until December 1[9]. The Safety Coordinator was a bargaining unit position. Respondent eliminated the Safety Coordinator and created a new position called Environmental Health and Safety Professional (EHS Professional). This position was salaried and included many of the duties of the Safety Coordinator in addition to new duties.

Respondent contends that the parties agreed to eliminate the Safety Coordinator in a Letter of Understanding dated April 1, 1998. The letter provides in pertinent part:

> During the 1998 negotiations, the parties discussed and acknowledged that an effective safety program may include the assignment of bargaining unit employees to non-traditional roles in support of safety. If the Company chooses to make such assignment, it shall have the sole right and responsibility to determine the need, duration and selection of employees to fill this position. Pay for such assignment shall be equal to the highest classification excluding team leader in the plant to which the assignment is made.
>
> It was further agreed that for those employees who are assigned as safety coordinators at the time of ratification of this agreement, they will continue in that role or maintain their pay for at least one year. Any coordinator thereafter reduced as a result of an evaluation of their role, shall be placed in the highest available classification for which they are qualified in their plant.

Pottgen was a member of Respondent's negotiating team during the 1997-1998 bargaining with the Union. Pottgen contends that the above Letter of Understanding was prepared after the Union admitted during bargaining that Respondent had the authority to eliminate the Safety Coordinator position. Nile Evans (Evans), president of Respondent from 1995 to March 2000 was also a member of Respondent's negotiating team. Evans admitted that after the 1998 contract was signed, Respondent could eliminate a person holding the Safety Coordinator job only, "if they were performing or not." Armenta was a member of the Union's negotiating team with Respondent in 1997-1998. Armenta said that the purpose of the above Letter of Understanding was to keep bargaining unit employees in the position of Safety Coordinator and that there was no agreement between the parties to give Respondent sole authority to eliminate the Safety Coordinator position. I credit Armenta's testimony. If the purpose of the Letter of Understanding was to give Respondent authority to eliminate the Safety Coordinator job from the bargaining unit, it is surprising that a bargaining unit employee, Fisher, was selected to fill this position in 2000.

5. The January 13, 2003 Schedule Change

Respondent's Aerospace press department normally operated four days a week with ten hour shifts, Monday through Thursday. In January 2003, Respondent had acquired new business that required two presses to run five days a week. However, there was only enough work on the remaining presses to operate three days. Respondent decided that it did not want to operate the two presses using overtime on Friday but to have employees who would have been idle rescheduled for Friday on a non-overtime basis.

[9] Richard Hernandez also held the position of Safety Coordinator until his job was removed from the bargaining unit on about December 30, 2002.

Dvorak announced the schedule change for the Aerospace press department on January 13, 2003. Dvorak told employees that they would have to take time off during the week to work on Fridays. This change meant that some employees had to be off work Monday through Thursday so they could work Friday. There is no dispute that this schedule change was made without notice to the Union. Later, Pottgen told Fisher that Respondent had to make a schedule change and Fisher agreed the changes should be voluntary. At about the same time Skippergosh told Dvorak he had no objection to the schedule changes if they were voluntary. While Dvorak testified Skippergosh agreed that it would be alright to force someone to change schedules, it is clear that Dvorak was speculating and there was no agreement by Skippergosh that Respondent could force employees to work on Friday. Respondent contends that the parties' collective-bargaining agreement, Article I, Section 3, gives Respondent the right to make changes to the work schedule without bargaining with the Union. This portion of the collective-bargaining agreement provides:

ARTICLE I. PURPOSE AND SCOPE

Section 3. Direction of Working Forces

> Except as may be limited by the provisions of this Agreement, the operation of the Company and the direction of the working forces, including the right to hire, lay off, suspend, dismiss and discharge any employee for proper and just cause, are vested exclusively with the Company. In exercising this right, the Company will not violate the Agreement.[10]

B. The Analysis

1. The Jesus Arredondo Grievance

It is well settled that an employer who by passes the collective-bargaining representative and deals directly with employees to resolve grievances violates the Act. *American Postal Workers Union*, 281 NLRB 1015 (1986); *Postal Service*, 268 NLRB 876, 877-878 (1984).

General Counsel's allegation that Respondent dealt directly with employees to resolve Arredondo's grievance rests upon a finding that Ramsey was acting as an agent of Respondent since there is no evidence that Pottgen dealt directly with Arredondo. The Board applies common law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action. *Cooper Industries,* 328 NLRB 145 (1999). Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp*., 315 NLRB 725 (1994). The Board's test for determining agency is whether, under all the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB 425, 426-427 (1987). An employee's statement may be attributed to the employer if the employee is held out as a conduit for transmitting information from the employer to other employees. *D & F Industries, Inc*., 339 NLRB No. 73, slip op. at 1 (2003).

[10] General Counsel's Exhibit 4.

The record is devoid of any evidence that Respondent authorized Ramsey to act as its agent or held her out as a conduit to resolve grievances on its behalf. There is no evidence that Ramsey's duties as team leader would have created a reasonable belief that she was acting on respondent's behalf. Ramsey's position as liaison for the Tribal Employment Relations Office of the Gila River Indian Community was not a position created by Respondent but by an independent entity. While Ramsey attended grievance hearings as liaison, this activity is not reflective of authority to deal with grievances on behalf of Respondent. Ramsey's frequent meetings with Pottgen at work, by themselves, do not establish agency since there is no evidence that Pottgen ever authorized or suggested that Ramsey had authority to speak on Respondent's behalf. Moreover, the meetings alone would not create a reasonable belief that Ramsey was speaking and acting for management. I find that Ramsey was not an agent of Respondent.

Having found no evidence to support General Counsel's allegation that Respondent dealt directly with employees in resolving Arredondo's grievance, I will dismiss that portion of the Complaint.

2. The Thanksgiving Holiday Grievance

As noted above, an employer who bypasses the collective-bargaining representative and deals directly with employees to resolve grievances violates the Act. *American Postal Workers Union*, 281 NLRB 1015 (1986); *Postal Service*, 268 NLRB 876, 877-878 (1984). However, having credited the testimony of both Sutton and Sorenson that Sutton could not have been present on November 18 or 19 to make the statements attributed to him by Lutes, i.e. that Pottgen had resolved the Thanksgiving schedule grievance with employee Sekayouma, I find there is no evidence to support General Counsel's allegation that Respondent dealt directly with employees to remedy the Thanksgiving schedule. I will dismiss that portion of the Complaint.

3. The Elimination of the Safety Coordinator Position

There is no dispute that Respondent removed the position of Safety Coordinator and its duties from the bargaining unit and created the new position of EHS Professional that subsumed the work of the Safety Coordinator. Respondent contends that the Union waived its right to bargain over the elimination of the Safety Coordinator from the bargaining unit in the April 1, 1998 Memorandum of Understanding to the collective-bargaining agreement.[11]

In *Taos Health System*, 319 NLRB 1361, 1364 (1995), the Board affirmed the Administrative Law Judge's finding that the employer violated Section 8(a)(1) and (5) of the Act when it unilaterally transferred bargaining unit work to newly created supervisory jobs. The ALJ concluded:

> During the term of a collective-bargaining agreement, an employer violates Section 8(a)(5) by modifying an explicit or implicit term of the agreement without the union signatory's consent or the union's "clear and unmistakable" waiver of its statutory right to bargain concerning the matter at issue. Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983); and Bonnell/Tredgar Industries, 313 NLRB 789 (1994), enfd. 46 F.3d. 339 (4th Cir. 1995).

A similar conclusion was reached in *Hampton House*, 317 NLRB 1005, 1005 (1995).

[11] General Counsel's Exhibit 4 at page 75.

Respondent's reliance upon the April 1, 1998 Memorandum of Understanding to establish the Union waived its right to bargain over the decision or effects of the decision to remove the Safety Coordinator job from the bargaining unit is misplaced. No reasonable reading of that letter establishes that the Union clearly and unmistakably waived its right to bargain over the elimination of the Safety Coordinator position. The first paragraph of the letter deals only with the right of Respondent to assign bargaining unit employees to the Safety Coordinator job. No mention is made of eliminating the job. Moreover the second paragraph of the Memorandum contemplates the ongoing role of bargaining unit employees in the Safety Coordinator job during the term of the collective-bargaining agreement. The second paragraph provides only that the individual holding the Safety Coordinator job will be placed into another bargaining unit position upon evaluation of their role. There is no express waiver here of the Union's right to bargain over the decision or effects of removal of the Safety Coordinator position from the bargaining unit.[12] I find that by unilaterally removing the Safety Coordinator job from the bargaining unit, Respondent violated Section 8(a)(1) and (5) of the Act. *Metropolitan Edison Co. v. NLRB*, 460 U.S. (1983); *Dorsey Trailers, Inc*., 327 NLRB 835 (1999); *Georgia Power Co.*, 325 NLRB 420 (1998); *Edgar Benjamin Healthcare Center,* 322 NLRB 750 (1996).

4. The January 13, 2003, Schedule Change

General Counsel contends that Dvorak's announcement that employees in the press department would have to take days off during the week in order to work on Fridays was direct dealing that violates Section 8(a)(1) and (5) of the Act. Respondent argues that the evidence does not support the allegation at paragraph 6(f) of the Complaint and that the Union waived any right to bargain about schedule changes.

I will deal first with Respondent's procedural argument that paragraph 6(f) of the Complaint should be dismissed because the Complaint allegations are not supported by the evidence. "The propriety of a pleading is today judged by its effectiveness as a mechanism for giving an adverse party notice of the claim upon which relief is sought." *Curtiss-Wright Corp. v. NLRB*, 347 F. 2d 61, 72 (3d Cir. 1965). "All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that the respondent may be put upon his defense." *American Newspaper Publishers Assn. v. NLRB*, 193 F. 2d 782, 800 (7th Cir. 1951), affd. 345 U.S. 100 (1953). Moreover, an unpled but fully litigated matter may support an unfair labor practice finding despite a lack of an allegation in the complaint. *Hi Tech Cable Corp.*, 318 NLRB 280, (1995). The Complaint at paragraph 6(f) provides:

> On or about January 13, 2003, the respondent, by Roger Devore,[13] at the Respondent's facility, dealt directly with employees regarding voluntary use of vacation days, personal time off, and unpaid time off as a means to avoid layoff of its employees.

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[12] While I have found that there is no ambiguity in the Memorandum of Understanding dated April 1, 1998, the testimony of witnesses who participated in the negotiations that led to the April 1, 1998 Memorandum of Understanding was conflicting and did nothing to shed light on the parties' intent. Niles testified that after the 1998 collective-bargaining agreement was signed the Safety Coordinator could be eliminated only if they were not performing their job.

[13] The record reflects that the correct name of this person is Roger Dvorak.

The evidence adduced at the hearing dealt with Dvorak's announcement of a schedule change and the need for employees to take days off during the week so they could work on Fridays. The issue of Respondent's direct dealing with employees concerning the schedule change and need to take days off was fully litigated at the hearing. I find that the Complaint allegation is supported by evidence concerning direct dealing and the need to take time off due to a schedule change. The complaint allegation put Respondent on notice that the direct dealing on January 13, 2003, concerning the schedule change and the need to take time off constituted an unfair labor practice. *Curtiss-Wright Corp. v. NLRB, supra.* Moreover, the issue of direct dealing concerning the schedule change was fully litigated even in the absence of a sufficient complaint allegation. *Hi Tech Cable Corp.*, *supra*.

With respect to the direct dealing allegation concerning the schedule change, the Board has held that an employer's direct discussion with employees about new work schedules without union approval is direct dealing in violation of Section 8(a)(1) and (5) of the Act. *Flambeau Airmold Corp*., 334 NLRB No. 16 (2001); *Harris-Teeter Super Markets, Inc.,* 310 NLRB 216, 217 (1993); *Harris-Teeter Super Markets, Inc*., 293 NLRB 743, 744-745 (1989).

Nevertheless, a union may waive its right to bargain about mandatory subjects. Waivers can occur in any of three ways: by express provision in the collective-bargaining agreement, by the conduct of the parties (including past practice, bargaining history and action or inaction), or by a combination of the two. *United Technologies Corp*., 274 NLRB 504, 507 (1985). In the instant case Respondent contends that there has been a waiver of the right to bargain over the schedule change by the Union and hence no direct dealing in violation of Section 8(a)(1) and (5) of the Act. Respondent argues there has been a waiver by the Union of the right to bargain about schedule changes by express agreement of the parties in the 1998 collective-bargaining agreement, by the agreement of Union representatives to the January 13, 2003, schedule change and through the Union's history of acquiescence to schedule changes.

Both the Board and the Courts have found that waivers of statutory rights are not to be lightly inferred, but instead must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). When an employer contends that the provisions of a collective-bargaining agreement show that a union has waived its right to bargain over an issue, either the contract language relied on must be specific or the employer must establish that the parties fully discussed the issue and that the union clearly and unmistakably waived its interest in the matter. *Trojan Yacht*, 319 NLRB 741, 742 (1995); *Angelus Block Co.*, 250 NLRB 868, 877 (1980).

The Board has consistently held that generally worded management rights clauses that do not contain language dealing with the specific subject allegedly waived is insufficient to waive a union's statutory bargaining rights. *Dorsey Trailers, Inc*., 327 NLRB 835 (1999); *Georgia Power Co.*, 325 NLRB 420 (1998); *Edgar Benjamin Healthcare Center,* 322 NLRB 750 (1996).

Respondent relies on Article I, Section 3 of the 1998 collective-bargaining agreement between the parties to establish the Union waived the right to bargain over scheduling employees. The language of Section 3 provides:

> Section 3. Direction of Working Forces
>
> Except as may be limited by the provisions of this Agreement, the operation of the Company and the direction of the working forces, including the right to hire, lay off, suspend, dismiss and discharge any employee for proper and just cause,

> are vested exclusively with the Company. In exercising this right, the Company will not violate the Agreement.

The contract provision in the instant case makes no mention of scheduling employees or requiring employees to take days off. The Companies' "direction of the working forces" language is too broad and ambiguous to infer that the Union waived its right to bargain over scheduling. Moreover, there is no bargaining history concerning this contract provision.[14] The evidence adduced at the hearing concerning past practice establishes only that Respondent has notified the Union about schedule changes and the Union has acquiesced in the changes. It is clear that past acquiescence to previous unilateral changes does not operate to waive a union's right to bargain over future changes. *Owens-Brockway Plastic*, 311 NLRB 519, 526 (1993).

Finally, Respondent contends that through both Fisher and Skippergosh, the Union agreed to the schedule changes. Respondent's reliance on any alleged agreements with Fisher and Skippergosh came only after Dvorak announced the schedule changes. The direct dealing, which is the subject of the unfair labor practice, had already occurred. I find that the Union did not waive its right to bargain over scheduling changes by express agreement or past practice.

I find that Respondent's announcement to employees that they would have to take a day off during the workweek to work on their day off without notice to or approval by the Union, constituted direct dealing with employees in violation of Section 8(a)(1) and (5) of the Act.

Conclusions of Law

By dealing directly with employees by telling them that they would have to take a day off during the week to work on their day off and by unilaterally removing the Safety Coordinator position from the bargaining unit without affording the Union an opportunity to bargain about the decision or its effects, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Respondent has not otherwise violated Sections 8(a)(1) and (5) of the Act as alleged in the Complaint.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent must bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All hourly production employees employed by the Respondent, but excluding all clerical employees, professional employees, die repair and maintenance employees and supervisors as defined in the Act.

[14] Respondent's reliance on Union griever Lutes' testimony that the collective-bargaining agreement gave Respondent the unilateral right to make schedule changes is misplaced. As a minor Union official with no evidence of expertise in bargaining history or contract interpretation, Lutes testimony is of dubious value.

Further having found that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally removing the Safety Coordinator position from the bargaining unit, I shall recommend that Respondent be ordered to reinstate Safety Coordinators John Fisher and Richard Hernandez and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of removal to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[15]

ORDER

The Respondent, Pimalco, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with the Union as the exclusive representative of out employees in the following appropriate unit:

> All hourly production employees employed by the Respondent, but excluding all clerical employees, professional employees, die repair and maintenance employees and supervisors as defined in the Act.

(b) Bypassing the Union and dealing directly with bargaining unit employees concerning wages, hours and other terms and conditions of employment.

(c) Removing bargaining unit positions without first giving the Union adequate notice and a meaningful opportunity to bargain with us regarding the decision to remove the position and the effects of removing the position.

(d) In any like or related manner interfere with, restrain or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All hourly production employees employed by the Respondent at its Chandler, Arizona facility, but excluding all clerical employees, professional employees, die repair and maintenance employees and supervisors as defined in the Act.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days from the date of this Order, offer John Fisher and Richard Hernandez full reinstatement to their former jobs as Safety Coordinator, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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(c) Make John Fisher and Richard Hernandez whole for any loss of earnings and other benefits suffered as a result of the removal of the Safety Coordinator job in the manner set forth in the Remedy section of the Decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and papers, and all other records, including an electronic copy of such records if stored in electronic form necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Chandler, Arizona copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, San Francisco, California, September 9, 2003.

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John J. McCarrick
Administrative Law Judge

[16] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union,
Choose representatives to bargain with us on your behalf,
Act together with other employees for your benefit and protection,
Choose not to engage in any of these protected activities.

WE WILL NOT fail to bargain in good faith with the United Steelworkers of America, AFL-CIO, CLC, (Union) as the exclusive representative of our employees in the following appropriate bargaining unit:

All hourly production employees employed by us at our facility located in Chandler, Arizona, but excluding all clerical employees, professional employees, die repair and maintenance employees, and supervisors, as defined in the Act.

WE WILL NOT bypass the Union and deal directly with employees in the bargaining unit concerning wages, hours and other terms and conditions of employment.

WE WILL NOT remove bargaining unit jobs without first giving the Union adequate notice, and a meaningful opportunity to bargain with us regarding the decision to remove the position and the effects of removing the position.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain in good faith with the Union as your exclusive collective-bargaining representative.

WE WILL Within 14 days from the date of this Order, offer John Fisher and Richard Hernandez full reinstatement to their former jobs as Safety Coordinator, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL Make John Fisher and Richard Hernandez whole for any loss of earnings and other benefits suffered as a result of the removal of the Safety Coordinator job in the manner set forth in the Remedy section of the decision.

PIMALCO, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800 Phoenix AZ, 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUSTNOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.